

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of:

Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
Petition of ALLTEL Communications, Inc.	)	DA 04-565
For Consent to Redefine the Service	)	
Areas of Rural Telephone Companies	)	
In the State of Wisconsin	)	

To: Chief, Wireline Competition Bureau

**COMMENTS OF MIDWEST WIRELESS WISCONSIN L.L.C. IN SUPPORT  
OF PETITION OF ALLTEL COMMUNICATIONS, INC.**

Midwest Wireless Wisconsin L.L.C. ("Midwest"), by counsel and pursuant to the Commission's *Public Notice* dated April 12, 2004,<sup>1</sup> provides comments in support of the petition of ALLTEL Communications, Inc. ("ALLTEL") seeking FCC concurrence with the redefinition of the service areas of several Wisconsin incumbent local exchange carriers ("ILECs") as provided under Section 54.207 of the FCC's rules, 47 C.F.R. Section 54.207.

**I. BACKGROUND AND INTRODUCTION**

On February 3, 2003, Midwest filed a petition with the Wisconsin Public Service Commission ("WPSC") requesting designation as an eligible telecommunications carrier ("ETC") in both rural and non-rural areas of Wisconsin. The WPSC granted Midwest's petition on September 30, 2003,<sup>2</sup> and on the same day granted ETC status to at least nine other

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<sup>1</sup> *Parties Are Invited To Update The Record Pertaining To Pending Petitions For Eligible Telecommunications Carrier Designations*, DA-04-999 (April 12, 2004). These comments are filed with the Chief, Wireline Competition Bureau, who has delegated authority pursuant to 47 C.F.R. Section 54.207(e).

<sup>2</sup> Midwest Wireless Wisconsin L.L.C., 8203-TI-100 (Sept. 30, 2003) ("PSC Order").

companies, including ALLTEL.<sup>3</sup> As part of its grant of Midwest's petition, the WPSC granted conditional ETC status with respect to those rural ILEC service areas only partially included within Midwest's proposed ETC service area, stating: "If the FCC approves use of the smaller area, then Midwest's ETC status for the smaller area(s) becomes effective." PSC Order at p. 10. The remaining ETC designation orders released that day, as well as an order designating United States Cellular Corporation as an ETC on December 20, 2002, contained similar language.

On November 21, 2003, ALLTEL filed its petition with the FCC seeking concurrence with the WPSC's decision to redefine certain rural ILEC service areas on a wire-center basis. Although ALLTEL supplemented its petition on March 26, 2004, following the release of *Virginia Cellular*,<sup>4</sup> this supplemental filing was not listed on the FCC's *Public Notice* seeking comment on updated petitions for ETC status and service area redefinition. ALLTEL filed a second supplement on May 14, 2004, in response to a second *Public Notice* ("Notice") which provided parties the opportunity to update their petitions.

The list of rural ILECs for which ALLTEL requested redefinition includes all of the rural ILECs listed in Midwest's designation order as requiring FCC concurrence.<sup>5</sup> Therefore, a grant of ALLTEL's petition will enable all of Midwest's conditional designations to take effect without further action. On information and belief, all or nearly all of the remaining competitive ETCs in Wisconsin will be similarly affected, *i.e.*, at least some of their conditionally designated

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<sup>3</sup> Other than Midwest and ALLTEL, the companies designated that day include: Nsighttel Wireless, LLC; Wisconsin RSA #3 Limited Partnership; Wisconsin RSA #4 Limited Partnership; Wisconsin RSA #10 Limited Partnership; Brown County MSA Cellular Limited Partnership; Metro Southwest PCS, LLP; and NPCR, Inc., d/b/a Nextel Partners.

<sup>4</sup> *Virginia Cellular, LLC*, 19 FCC Rcd 1563 (2004) ("*Virginia Cellular*").

<sup>5</sup> A copy of the PSC Order, including its attachment setting forth the rural ILEC wire centers subject to redefinition, is attached for the Commission's convenience.

territory will become effective upon a grant of ALLTEL's petition.<sup>6</sup> Accordingly, this proceeding concerns not just ALLTEL, but at least ten other competitive ETCs as well.

## **II. THE SCOPE OF A SECTION 54.207 PROCEEDING IS LIMITED**

The question of whether it was in the public interest to grant ALLTEL's petition for ETC designation throughout its requested ETC service area is not at issue in this proceeding. In designating ALLTEL, Midwest, and other competitive ETCs, the MPUC exercised statutory authority that lies solely with the state. Determinations as to the contours of a competitive ETC's service area and whether the public interest would be served by the competitive ETC's designation are solely within the province of a state's jurisdiction to designate ETCs under Section 214(e)(2). Thus, unless it has relinquished jurisdiction to the FCC, only a state may determine whether it is in the public interest to designate a competitor such as Midwest in all or part of an ILEC's service area. The WPSC did not relinquish jurisdiction. In the PSC Order, the WPSC determined that it was in the public interest to grant ETC status to Midwest in all of the rural ILEC service areas in which it requested designation.<sup>7</sup> It made similar findings with respect to ALLTEL, and the other competitive ETCs it has designated.

The FCC is bound by statute to respect a state's judgment, made pursuant to 47 C.F.R. Section 214(e)(2), with respect to whether it is in the public interest to designate a competitor as an ETC in specific rural ILEC service areas. In addition, it should respect the state's judgment regarding whether an ILEC service area should be redefined pursuant to Section 214(e)(5). Deferring to a state's expertise would be consistent with the FCC's recent request that the

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<sup>6</sup> See, e.g., Comments of NPCR, Inc., d/b/a Nextel (filed Dec. 19, 2003) at p. 2 ("The partially-covered RTC study areas for which Nextel Partners was conditionally designated as an ETC by the PSCW are included within the scope of the AllTel Petition.")

<sup>7</sup> See PSC Order at pp. 8-9.

Virginia Corporation Commission examine the FCC's proposed service area redefinition of Virginia Cellular "based on its unique familiarity with the rural areas in question."<sup>8</sup> Accordingly, the FCC's role in this process is limited, and a high level of deference to the WPSC's conclusions is warranted.

### **III. THE FCC SHOULD FOLLOW THE WPSC'S WELL-CONSIDERED DECISION TO REDEFINE THE AFFECTED RURAL ILEC SERVICE AREAS**

ALLTEL's petition to the FCC follows the framework set up by Congress, in Section 214(e) of the 1996 Act, 47 U.S.C. Section 214(e), and the FCC in Section 54.207 of the rules. The state and the FCC must agree on any redefinition of ILEC service areas made necessary by the designation of a competitive ETC in an area that is different from an ILEC study area. The scope of a redefinition proceeding under Section 54.207 is limited to criteria articulated by the Federal-State Joint Board on Universal Service ("Joint Board"). The Joint Board's stated concerns about redefining rural ILEC service areas have been in place for a number of years and have been followed in numerous cases throughout the country, including the Midwest proceeding in Minnesota (Docket PT-6153 /AM-02-686).<sup>9</sup> Under Section 54.207, neither the FCC nor the state has authority to dictate the service area redefinition of a rural ILEC. The parties must reach agreement.

Concerns raised by the Joint Board focus on whether the proposed redefinition of rural ILEC service areas would: (1) permit the competitor to intentionally or unintentionally cream skim low-cost areas of affected rural ILECs; (2) impose any undue administrative burdens on affected rural ILECs; or (3) properly recognize rural ILECs' status as rural telephone companies.

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<sup>8</sup> *Virginia Cellular, supra* at 1582.

<sup>9</sup> Federal-State Joint Board on Universal Service (Recommended Decision), 12 FCC Rcd 87 (Jt. Bd., 1996).

These concerns were thoroughly considered in ALLTEL's Petition and in the orders designating ALLTEL, Midwest and other competitive ETCs in Wisconsin.

Here, the WPSC has found that the opportunity to disaggregate high-cost support is sufficient to protect rural ILECs from competitors receiving uneconomic support levels, even unintentionally.<sup>10</sup> Specifically, the WPSC concluded:

Originally, there were concerns about "cherry picking" or "cream skimming." At that time [in 1997], the USF support was averaged across all lines served by a provider within its study area. The per line support was the same throughout the study area. The concern was that competitive companies might ask for ETC designation in the parts of a rural company's territory that cost less to serve. It could thereby receive the averaged federal high-cost assistance while only serving the low-cost areas of the territory, while the ILEC received federal high-cost assistance but had to serve the entire territory, including the high-cost areas. . . . ***However, since that time, the USF funding mechanisms have changed. . . . An ILEC has the option to target the federal high-cost assistance it receives so that it receives more USF money per line in the parts of the territory where it costs more to provide service, and less federal USF money in the parts of the territory where it costs less to provide service. . . . Since the competitive ETC receives the same per line amount as the ILEC, if it chooses to only serve the lower cost parts of the territory, then it receives only the lower amount of federal USF money.***<sup>11</sup>

Several ILECs have taken advantage of the opportunity they were presented with in 2002 and disaggregated support below the study-area level. In so doing, they have protected themselves from uneconomic competition. Those that have not disaggregated may still do so pursuant to Section 54.315 of the FCC's rules, which permits rural ILECs, subject to state approval, to disaggregate their support into an unlimited number of sub-wire center cost zones to

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<sup>10</sup> See PSC Order at pp. 11-12.

<sup>11</sup> *Id.*

prevent uneconomic support from flowing to competitors. It is for these reasons the WPSC concluded that any concerns about creamskimming are now “largely moot.”<sup>12</sup>

#### **IV. NEITHER *VIRGINIA CELLULAR* NOR *HIGHLAND CELLULAR* WARRANTS ADDITIONAL ANALYSIS IN THIS PROCEEDING**

Although ALLTEL supplemented the record “[p]ursuant to the requirements of *Virginia Cellular*”, and then further supplemented the record “to reflect the requirements of *Highland Cellular*”, Midwest submits that neither supplement was necessary under the referenced orders.

As an initial matter, Midwest notes that the “new standards and requirements” referenced in the *Notice* were adopted in an adjudicatory proceeding rather than through appropriate rulemaking channels. The FCC’s ad hoc adoption of new rules and unexplained reversal of precedent have prompted multiple interested parties to file petitions for reconsideration of both *Virginia Cellular* and *Highland Cellular*. Midwest was certainly not on notice that two individual Virginia ETC designation orders would result in new standards and requirements applicable to the redefinition of service areas in Wisconsin, and thus had no real opportunity to participate in the proceeding that led to their adoption. Any final order that denies any portion of the Petition based on these new standards would therefore be unfair to Midwest and the other competitive ETCs affected by this proceeding. Such a decision would also run counter to the *Accardi* doctrine, under which the FCC “is bound to follow its existing rules until they have been amended pursuant to the procedures specified by [the APA].”<sup>13</sup>

Second, this case is not about defining ALLTEL’s ETC service area, and it is not about whether ALLTEL will engage in “creamskimming.” This case is solely about whether, in light of the Joint Board’s recommendations, the redefinition of affected rural ILEC service areas along

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<sup>12</sup> *Id.* at p. 11.

wire-center boundaries is appropriate. As discussed above, a grant of ALLTEL's Petition would have positive effects that reach far beyond ALLTEL. For starters, Midwest's conditional designation would take effect in all of its requested areas, and Nextel submits that it would be similarly affected. Other competitive ETCs are likely to have part or all of their conditional designations take effect as well.

While ALLTEL's population density analysis certainly suggests that it is not seeking to serve primarily the high-density ILEC wire centers, this would only be the tip of the iceberg. Having evaluated ALLTEL's relative population densities, the FCC would then have to conduct another analysis to determine whether high-density areas are being targeted by Midwest. If the FCC found that neither ALLTEL nor Midwest is targeting such areas, the FCC's job would not be done. It would then have to go through the same analysis with respect to Nextel, and then the seven or more additional competitive ETCs with conditional designations in the relevant areas. At the end of this piling-on of analyses, it is quite possible that some competitive ETCs would be found to have conditional designations in predominately high-density rural ILEC wire centers. In such a case, strict application of *Virginia Cellular* and *Highland Cellular* would result in a refusal to redefine the relevant ILEC service areas. As a result of one company "failing" the population density test, **no** conditional designations in **any** portion of the affected ILECs' service areas could enter into effect, no matter how many competitive ETCs "passed". Accordingly, if the FCC took the ill-advised step of borrowing the population density analysis from *Virginia Cellular* and *Highland Cellular* and applying it to redefinition proceedings, the likely result would be a denial in virtually every case.

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*Amendment of Part 74, Subpart K, of the Commission's Rules*, 22 FCC 2d 586, 591 (1969).

It is important that the FCC not lose sight of the forest for the trees. If the FCC analyzes population density and grants or denies petitions for concurrence based on the results with respect to individual competitors, then it will engage in a nonsensical exercise that goes far beyond its obligation to ensure that creamskimming opportunities are minimized. The unintended consequence would be that rural consumers in many areas would never see the benefits of increased competition that result from USF-assisted investments in competitive telecommunications infrastructure. The proper focus, therefore, is on whether competitors are likely to take advantage of creamskimming opportunities, wherever they may enter in a given rural ILEC's service area. As the WPSC properly concluded, the Path 3 disaggregation filings by several of the affected rural ILECs – and the opportunity for others to disaggregate under Path 2 should they deem it necessary when a competitor enters – fully resolve creamskimming concerns. Accordingly, Midwest submits that population density analyses are not appropriate in this or any other proceeding evaluating state redefinition proposals.

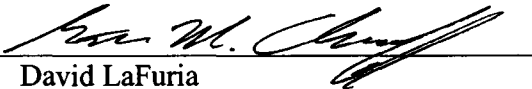
## **V. CONCLUSION**

The WPSC has properly considered and reaffirmed its decision to redefine rural ILEC service areas along wire center boundaries. FCC concurrence is entirely appropriate. Midwest respectfully requests the FCC to promptly issue an order concurring with the redefinition approved by the WPSC and requested by ALLTEL so that rural consumers can start to benefit from high-cost support in those areas at the earliest possible date.



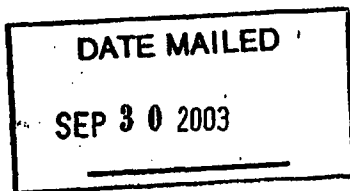
Respectfully submitted,

**MIDWEST WIRELESS WISCONSIN L.L.C.**

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May 28, 2004



BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Midwest Wireless Wisconsin, LLC for  
Designation as an Eligible Telecommunications Carrier  
in Wisconsin

8203-TI-100

**FINAL DECISION**

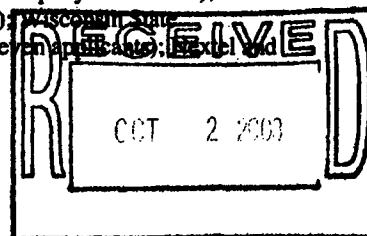
This is the final decision in this proceeding to determine whether to designate Midwest Wireless Wisconsin, LLC (Midwest) as an Eligible Telecommunications Carrier (ETC), pursuant to 47 U.S.C. § 214(e)(2) and Wis. Admin. Code § PSC 160.13. Designation as an ETC makes a provider eligible to receive universal service fund (USF) monies.

**Introduction**

Midwest filed an application for ETC designation on February 3, 2003. The Commission issued a Notice of Investigation on April 7, 2003. The Commission issued a Notice Requesting Comments on September 12, 2003. A number of entities filed comments on September 18, 2003.<sup>1</sup> The Commission discussed this matter at its September 25, 2003 open meeting.

Midwest requested ETC designation for the exchanges shown in Appendix B. The territories for which ETC designation is requested are served by a mix of rural and non-rural telecommunications carriers.

<sup>1</sup> Citizens Utility Board ("CUB"); CenturyTel, Inc. and TDS Telecom Corporation; the Wisconsin State Telecommunications Association Small Company Committee (WSTA Small Company Committee); Wisconsin State Telecommunications Association ILEC Division (WSTA ILEC Division); Wisconsin State Telecommunications Association Wireless Division; Nsighttel Wireless (for service area: Nextel and ALLTEL.



**Findings of Fact**

1. The wireless industry, its customary practices, its usual customer base, and Midwest's desire not to obtain state USF money create an unusual situation.
2. It is reasonable to adopt different ETC eligibility requirements and obligations for Midwest than specified by Wis. Admin. Code § PSC 160.13.
3. It is reasonable to require Midwest to meet only the federal requirements for ETC status in order to be eligible for ETC designation.
4. It is reasonable to relieve Midwest from ETC obligations other than those imposed under federal law.
5. It is reasonable to require that Midwest not apply for state USF funds and that if it ever does, all state requirements for and obligations of ETC status shall again be applicable to it.
6. Midwest meets the federal requirements for ETC designation.
7. It is in the public interest to designate Midwest as an ETC in certain areas served by rural telephone companies.
8. It is reasonable to grant Midwest ETC status in the non-rural wire centers indicated in its application, to the extent that the wire centers are located within the state.
9. It is reasonable to grant Midwest ETC status in the areas for which it has requested such designation where the request includes the entire territory of a rural telephone company, to the extent such areas are located within the state.
10. It is reasonable to grant Midwest ETC status in the areas for which it has requested such designation where the request does not include the entire territory of a rural

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telephone company, to the extent the areas are located within the state, conditioned upon the Federal Communications Commission (FCC) approving the use of the smaller areas.

### **Conclusions of Law**

The Commission has jurisdiction and authority under Wis. Stats. §§ 196.02, 196.218 and 196.395; Wis. Admin. Code ch. PSC 160; 47 U.S.C. §§ 214 and 254; and other pertinent provisions of the Telecommunications Act of 1996, to make the above Findings of Fact and to issue this Order.

The law does not require the Commission conduct a hearing in this docket as requested by the CUB; CenturyTel, Inc., and TDS Telecom Corporation; and the WSTA Small Company Committee and WSTA ILEC Division.

If "notice and opportunity for hearing" as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement.

### **Opinion**

On December 20, 2002, the Commission granted the U.S. Cellular ETC status as applied for in Docket No. 8225-TI-102. *Application of United States Cellular Corporation for Designation as an Eligible Telecommunications Carrier in Wisconsin*, Docket No. 8225-TI-102, 2002 WL 32081608, (Wisconsin Public Service Commission, December 20, 2002). The instant application is substantively similar to the application of U.S. Cellular. The Commission reaffirms its decision in Docket No. 8225-TI-102 and relies on the opinion issued in the Final Decision in that docket, to approve Midwest's application.

ETC status was created by the FCC, and codified in 47 U.S.C. § 214(e)(2). Under FCC rules, the state commissions are required to designate providers as ETCs. 47 U.S.C. § 214(e)(2), 47 C.F.R. § 54.201(b). Designation as an ETC is required if a provider is to receive federal universal service funding. ETC designation is also required to receive funding from some, but not all, state universal service programs.

The FCC established a set of minimum criteria that all ETCs must meet. These are codified in the federal rules. 47 U.S.C. § 214(e)(1), 47 C.F.R. § 54.101(a). The 1996 Telecommunications Act states that "States may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). A court upheld the states' right to impose additional conditions on ETCs in *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 418 (5<sup>th</sup> Cir. 1999). While states must designate multiple ETCs if more than one provider meets the requirements and requests that status in a non-rural area, it must determine that it is in the public interest before designating more than one ETC in a rural area. 47 C.F.R. § 54.201. The Commission has already designated one ETC in each rural area.

In the year 2000, the Commission promulgated rules covering ETC designations and requirements in Wisconsin. Wis. Admin. Code § PSC 160.13. Those rules govern the process for ETC designation and set forth a minimum set of requirements for providers seeking ETC designation from the Commission. The application filed by Midwest asks that it be designated as an ETC for federal purposes only. It states that it is not seeking designation as an ETC for state purposes and, therefore, is not required to meet the additional state requirements.

States must examine the federal requirements, but are allowed to create additional requirements. Wisconsin has done so. The Commission's requirements for ETC designation

clarify and expand upon the more basic FCC rules. There is no provision in the rule for designation as an ETC for federal purposes only. If a provider seeks to be designated as an ETC, it must follow the procedures and requirements in Wis. Admin. Code § PSC 160.13 and, if such a designation is granted, that designation serves to qualify the provider for both state and federal universal service funding. However, Wis. Admin. Code § PSC 160.01(2)(b) provides that:

Nothing in this chapter shall preclude special and individual consideration being given to exceptional or unusual situations and upon due investigation of the facts and circumstances involved, the adoption of requirements as to individual providers or services that may be lesser, greater, other or different than those provided in this chapter.

Midwest's request for ETC status presents an unusual situation. The wireless industry, its customary practices, and its usual customer base are quite different than those of wireline companies. Additionally, Midwest has stated that it has no desire to obtain state USF money. The Commission finds that under the particular circumstances of this case, it is reasonable to adopt different ETC requirements for Midwest to meet, and to grant ETC status to Midwest with certain limitations.

Because Midwest only wishes to obtain federal USF support, the Commission shall adopt the federal requirements for ETC status as the requirements that Midwest must meet to obtain ETC status. The federal requirements are found in 47 U.S.C. § 214(e)(1) and 47 C.F.R. §§ 54.101(a), 54.405 and 54.411. Further, the Commission relieves Midwest from ETC obligations other than those imposed under federal law. However, since Midwest will not be subject to the state requirements and state obligations, the Commission requires that Midwest not apply for state USF money. If Midwest ever does apply for state USF money, then all of the state requirements for and obligations of ETC status shall again be applicable to Midwest.

The Commission finds that Midwest has met the requirements for ETC designation; it will offer supported service to all customers in its designation areas and will advertise these services. In the FCC Declaratory Ruling *In the Matter of Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, FCC 00-248 (released 8/10/00), par. 24 (South Dakota Decision) the FCC has stated:

A new entrant can make a reasonable demonstration to the state commission of its capability and commitment to provide universal service without the actual provision of the proposed service. There are several possible methods for doing so, including, but not limited to: (1) a description of the proposed service technology, as supported by appropriate submissions; (2) a demonstration of the extent to which the carrier may otherwise be providing telecommunications services within the state; (3) a description of the extent to which the carrier has entered into interconnection and resale agreements; or, (4) a sworn affidavit signed by a representative of the carrier to ensure compliance with the obligation to offer and advertise the supported services.

If this is sufficient for a new entrant, it would seem to be even more so for someone who has already started to serve portions of the exchanges. Midwest submitted an affidavit ensuring compliance and, as mentioned earlier, is not only providing service in other areas of the state but also in parts of the areas for which it has requested ETC status.

The Commission finds that Midwest meets the requirement to offer service to all requesting customers. It has stated in its application and comments that it will do so. Many filing comments argue that the applicant will not provide service to all customers in the indicated exchanges and thus, because of the issue of "cellular shadows," the applicant will not meet the same standard that is applied to wireline providers. However, this is a case where "the devil is in the details." It is true that the purpose of universal service programs is to ensure that customers who might not otherwise be served at affordable rates by a competitive market still receive

service. However, like for wireline companies, access to high cost assistance is what helps ensure that service is provided. For Midwest, access to high cost assistance is exactly what will make expanding service to customers requesting service in the areas for which it is designated as an ETC "commercially reasonable" or "economically feasible." As the FCC has said:

A new entrant, once designated as an ETC, is required, as the incumbent is required, to extend its network to serve new customers upon reasonable request. South Dakota Decision, par. 17.

Midwest, like wireline ETCs, must fulfill this mandate, and access to high cost funding is what will help make doing so possible. The issue of "dead spots" is not significantly different from a wireline ETC that does not have its own lines in a portion of an exchange, perhaps a newly developed area. After obtaining a reasonable request for service, the wireline is required to find a way to offer service, either through extending its own facilities or other options. So too, Midwest must be given a reasonable opportunity to provide service to requesting customers, whether through expansion of its own facilities or some other method.

Midwest has also stated in its affidavit, application, and comments that it will advertise the designated services as required under 47 U.S.C. § 214(e)(1)(B), including the availability of low income programs.

Other objections to Midwest's designation focus on an alleged inability to meet certain additional state requirements in Wis. Admin. Code § PSC 160.13. These are moot, however, since the Commission has adopted different requirements for Midwest.

Some of the exchanges for which Midwest seeks ETC status are served by non-rural ILECs (SBC or Verizon). Under Wis. Admin. Code § PSC 160.13(3) and 47 U.S.C. § 251(e)(2), the Commission must designate multiple ETCs in areas served by such non-rural companies.



However, the Commission may only designate multiple ETCs in an area served by a rural company if designating more than one ETC is in the public interest. Some of the exchanges for which Midwest seeks ETC status are served by rural telephone companies.

The Commission finds that designating Midwest as an additional ETC in these areas is in the public interest. In its determination, the Commission is guided by the Wis. Stat. §196.03(6) factors to consider when making a public interest determination:

- (a) Promotion and preservation of competition consistent with ch. 133 and s. 196.219.
- (b) Promotion of consumer choice.
- (c) Impact on the quality of life for the public, including privacy considerations.
- (d) Promotion of universal service.
- (e) Promotion of economic development, including telecommunications infrastructure deployment.
- (f) Promotion of efficiency and productivity.
- (g) Promotion of telecommunications services in geographical areas with diverse income or racial populations.

The Commission finds that designating Midwest as an ETC in areas served by rural companies will increase competition in those areas and, so, will increase consumer choice.

While it is true that Midwest is currently serving in at least some of these areas, the availability of high cost support for infrastructure deployment will allow Midwest to expand its availability in these areas. Further, designation of another ETC may spur ILEC infrastructure deployment and encourage further efficiencies and productivity gains. Additional infrastructure deployment, additional consumer choices, the effects of competition, the provision of new technologies, a mobility option and increased local calling areas will benefit consumers and improve the quality of life for affected citizens of Wisconsin. As a result, the Commission finds that it is in the

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public interest to designate Midwest as an ETC in the areas served by rural telephone companies for which it has requested such designation.<sup>2</sup>

The areas for which Midwest is granted ETC status vary. Wis. Admin. Code § PSC 160.13(2) states that the areas in which a provider shall be designated as an ETC depend on the nature of the ILEC serving that area. If the ILEC is a non-rural telephone company, the designation area is the ILEC's wire center. The FCC has urged states not to require that competitive ETCs be required to offer service in the entire territory of large ILECs. It has found that such a requirement could be a barrier to entry. *Report and Order in the Matter of Federal-State Joint Board on Universal Service*, FCC 97-157 (released 5/8/97) pars. 176-177 (First Report and Order). Wisconsin's rule provision resolves this federal concern. As a result, Midwest is granted ETC status in the SBC and Verizon wire centers for which it requested such status, to the extent that such wire centers are located within the state.

Wis. Admin. Code § PSC 160.13(2) provides that if the ILEC is a rural telephone company, the ETC designation area is different. For an area served by a rural telephone company, the designation area is generally the entire territory (study area) of that rural company. A smaller designation area is prohibited unless the Commission designates and the FCC approves a smaller area. 47 C.F.R. § 54.207(b). Midwest's application contained a list of rural telephone company areas for which it requested ETC status. Attachment B, prepared by the Commission, show the rural areas for which it believes Midwest is seeking ETC status. If this list is not accurate, Midwest is ordered to submit to the Commission a revised list, in the same format as the attachment to this order, by October 31, 2003.

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<sup>2</sup> Eighteen other state commissions and the FCC have approved wireless ETC applications as second ETCs in rural areas on similar grounds.

The Commission also grants ETC status to Midwest in the areas for which it is seeking designation for the entire territory of a rural telephone company, to the extent that such exchanges are located within the state. Finally, where Midwest is asking for ETC designation in some, but not all, parts of the territory of a rural telephone company, the Commission conditionally grants ETC status in the areas for which Midwest has requested such designation, to the extent that such exchanges are located within the state. However, Midwest must apply to the FCC for approval of the use of a smaller area in such a designation. 47 C.F.R.

§ 54.207(c)(1). If the FCC approves use of the smaller area, then Midwest's ETC status for the smaller area(s) becomes effective. If the FCC does not approve use of the smaller area(s), then Midwest's conditional ETC status for such an area is void. In such a case, if Midwest determines that it then wants to apply for ETC status in the entire territory of the rural company, it may submit a new application requesting such designation.

The Commission grants this conditional status after having considered the changing market and the reason why the limitations on ETC designation in rural areas was created. Originally, there were concerns about "cherry picking" or "cream skimming." At that time, the USF support was averaged across all lines served by a provider within its study area. The per line support was the same throughout the study area. The concern was that competitive companies might ask for ETC designation in the parts of a rural company's territory that cost less to serve. It could thereby receive the averaged federal high-cost assistance while only serving the low-cost areas of the territory, while the ILEC received federal high-cost assistance but had to serve the entire territory, including the high-cost areas. First Report and Order, par. 189. As a result, the FCC found that unless otherwise approved by both the state and the FCC, a competitor

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seeking ETC status in the territory of a rural company must commit to serving the entire territory. First Report and Order, par. 189.

However, since that time, the USF funding mechanisms have changed. Currently, a competitive ETC gets the same amount of federal high-cost assistance per line as the ILEC. An ILEC has the option to target the federal high-cost assistance it receives so that it receives more USF money per line in the parts of the territory where it costs more to provide service, and less federal USF money in the parts of the territory where it costs less to provide service. *In the Matter of Multi-Association Group (MAG) Plan*, FCC 01-157 (released 5/23/01), par. 147. (MAG Order) Since the competitive ETC receives the same per line amount as the ILEC, if it chooses to only serve the lower cost parts of the territory, then it receives only the lower amount of federal USF money. As a result, as recognized by the FCC, the concerns about "cherry picking" and "cream skimming" are largely moot. *In the Matter of Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, FCC 01-311 (released 10/16/01), par. 12.

In the MAG Order, rural telephone companies were given the opportunity to choose a disaggregation and targeting method or to not disaggregate and target USF support. MAG Order, pars. 147-154. Companies were allowed to choose one of three targeting paths. Some of the companies in whose territory Midwest is seeking ETC designation chose Path One (no targeting) and some chose Path Three (targeting). If a competitive ETC is named in all, or part, of the service territory of a rural company, that company may ask the Commission to allow it to choose another Path. The FCC believed that state involvement in path changes gave competitors some certainty as to the amount of per line support available while preventing a rural company

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from choosing or moving to a different path for anti-competitive reasons. MAG Order, par. 153.

Some of the companies in whose territory Midwest is seeking ETC designation have disaggregated and targeted USF support, and some have not. However, the Commission may allow a company to change paths when a competitive ETC is designated in a rural company's territory.

#### **Requests for Hearing**

In accordance with the Notice Requesting Comments, dated September 12, 2003, the Commission received eight filings, four of which requested, on various grounds, the Commission conduct a contested case hearing before deliberation of the application. CenturyTel, Inc. and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42. WSTA Small Company Committee and WSTA ILEC Division also suggested that the Commission should hold a contested case hearing. Citizens Utility Board (CUB) also claimed a right to a hearing under Wis. Stat. § 227.42. The law, however, does not require the Commission conduct a hearing in this docket as requested. Furthermore, if "notice and opportunity for hearing" as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement.

CenturyTel, Inc. and TDS Telecom Corporation claimed a right to a hearing under Wis. Admin. Code § PSC 160.13(3) and Wis. Stat. § 227.42.

Wis. Admin. Code § PSC 160.13 (3) states:

For an area served by an incumbent local exchange service provider that is a rural telephone company, the commission may only designate an additional

eligible telecommunications carrier after finding that the public interest requires multiple eligible telecommunications carriers, pursuant to federal law and s. 196.50 (2), Stats. For an area served by an incumbent local exchange service provider that is not a rural telephone company, the commission may designate an additional eligible telecommunications carrier without making such a finding.

Wis. Stat. § 196.50(2), designates the process to certify a telecommunications utility.

Wis. Stat. § 196.50(2), states in part, "... after notice and opportunity for hearing, that the applicant possesses sufficient technical, financial and managerial resources to provide telecommunications service to any person within the identified geographic area." According to the rule and statute it would appear that notice and opportunity for hearing is a required procedure in the instant case.

Wis. Stat. § 196.50(2), however, does not apply to an application for ETC status of a wireless company to be an additional ETC in a rural area. Wis. Stat. § 196.202,<sup>3</sup> expressly restricts Commission jurisdiction over wireless providers. This statute prevents the Commission from applying almost every provision of Wis. ch. 196, to wireless providers, except for

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<sup>3</sup> Wis. Stat. § 196.202, states:

**Exemption of commercial mobile radio service providers. (2) Scope of regulation.** A commercial mobile radio service provider is not subject to ch. 201 or this chapter, except as provided in sub. (5), and except that a commercial mobile radio service provider is subject to s. 196.218 (3) if the commission promulgates rules that designate commercial mobile radio service providers as eligible to receive universal service funding under both the federal and state universal service fund programs. If the commission promulgates such rules, a commercial mobile radio service provider shall respond, subject to the protection of the commercial mobile radio service provider's competitive information, to all reasonable requests for information about its operations in this state from the commission necessary to administer the universal service fund. **(5) Billing.** A commercial mobile radio service provider may not charge a customer for an incomplete call.

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Wis. Stat. § 196.218(3).<sup>4</sup> This section only applies if, "the commission promulgates rules that designate [cellular] providers as eligible to receive universal service funding under both the federal and state universal service fund programs." Wis. Stat. § 196.218(3), mandates telecommunications providers contribute to the Wisconsin Universal Service Fund (WUSF). (Wireless providers currently have been exempted.) This section, however, is wholly unrelated to the requirements for eligibility to receive money from the WUSF and, otherwise, unrelated to this case.

The Commission cannot apply Wis. Stat. § 196.50(2), to wireless providers. The Commission, therefore, cannot proceed under Wis. Stat. § 196.50(2)(f), when evaluating the ETC application of a wireless provider. As a matter of law, the reference to Wis. Stat. § 196.50(2)(b)(f), in Wis. Admin Code § PSC 160.13, cannot apply to ETC applications of wireless providers, including Midwest.

Wis. Stat § 227.42 provides a right to a hearing, treated as a contested case, to any person filing a written request for a hearing with an agency who meets the following four part test:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

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<sup>4</sup> Wis. Stat. § 196.218 (3), states, in part:

**Contributions to the fund.** (a) 1. Except as provided in par. (b), the commission shall require all telecommunications providers to contribute to the universal service fund beginning on January 1, 1996, determined by the commission under par. (a) 4.

CenturyTel, Inc. and TDS Telecom Corporation own local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas at issue. These companies are competitors of Midwest. On this basis, these companies claim they have a substantial interest protected by law, and will suffer special injury based on the ETC designation of Midwest. Federal law and state law, however, do not create a substantial, or property, interest in exclusive ETC status for incumbent rural ETCs. *Alenco Communications v. FCC*, 201 F.3d 608 (2000) ("The purpose of universal service is to benefit the customer, not the carrier."); *WITA v. WUTA*, 65 P.3d 319 (2003); *In re Application of GCC License Corp.*, 647 N.W.2d 45, 52, 264 Neb. 167, 177 (2002). ("[r]ather, customers' interest, not competitors', should control agencies' decisions affecting universal service" and that "[t]he Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETCs simply by default as the sole service provider operating in a particular area.") See also, *State ex rel. 1<sup>st</sup> Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 311 (1980). (Economic injury as the result of lawful competition does not confer standing.); *MCI Telecommunications v. Pub. Serv. Comm.*, 164 Wis. 2d 489, 496, 476 N.W.2d 575 (Ct. App. 1991); and *Wisconsin Power & Light v. PSC*, 45 Wis. 2d 253 (1969) ("... the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities.")

In addition, these companies also claim that granting Midwest ETC status will reduce the amount of USF funds available to the public. As explained above, such result does not injure companies' protected interest. As explained below, increasing the



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number of carriers eligible for federal USF money will increase the amount of federal USF dollars brought into Wisconsin. Moreover, companies' claim is entirely speculative.

WSTA Small Company Committee and WSTA ILEC Division also suggested that the Commission should hold a contested case hearing. These organizations represent local exchange telephone companies that provide essential telecommunications service as ETCs in the rural areas at issue who are competitors of Midwest. These comments suggest the Commission hold a contested case hearing. These organizations, however, did not invoke Wis. Stat. § 227.42 or attempt to apply the standards therein. Had these organizations claimed such a right to a hearing under Wis. Stat. § 227.42, the same analysis would apply to them as described for the CenturyTel, Inc. and TDS Telecom Corporation claim.

CUB also claims a right to a hearing under Wis. Stat. § 227.42. CUB further requests that the Commission consolidate ten pending ETC applications of wireless providers into one contested case for investigation of common issues.

CUB asserts it has a substantial interest protected by law, and will suffer special injury based on the ETC designation of Midwest because it claims to represent customers in the geographic area in which the applicant seeks ETC designation. As customers of the current ETC in that area, and as payees into the universal service fund, its members have a substantial interest that fund money is not wasted through certification of an inappropriate carrier. The federal USF, however, provides a benefit to customers through the assistance of carriers who commit to providing service in high-cost areas. The designation of more than one ETC in a particular high-cost area

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allows more carriers providing service in rural Wisconsin, such as Midwest, to tap into money collected on a nation-wide basis so that more services and more provider choices can be afforded to these customers. As such, far from threatening their substantial interests, ETC designation, like the instant one, necessarily provides a benefit to customers. On this basis, a hearing was not required by CUB's request.

CUB asserted that it meets the standards of Wis. Stat. § 227.42(1)(d), because it disputes the factual assertions made by the applicant that allowing it to receive ETC status will further the public interest by bringing the benefits of competition to underserved marketplaces and that the application provides the Commission with enough information regarding what services will be offered and at what cost to support it claims ETC designation is in the public interest. These assertions amount to a generalized challenge regarding the sufficiency of Midwest's application. A hearing, however, is not required on such basis. Wis. Stat. § 227.42(1), contemplates that a requester provide some showing that it meets the four part test. CUB fails to present any facts that either contradict the assertions of the applicant or demonstrate that any of CUB's alleged deficiencies in the application are fact-based and material.

All filers requesting a hearing state or allude to the cumulative effect of granting the ten pending wireless ETC applications as an appropriate issue in this docket. The Commission, however, has not consolidated these applications into one case. The ETC designation process is based on the application of an individual carrier to the standards Wis. Admin. Code § PSC 160.13. Issues regarding the cumulative impact of this decision, and decisions like it, are not before the Commission.

The law does not require the Commission conduct a hearing in this docket. If "notice and opportunity for hearing" as provided by Wis. Stat. § 196.50(2)(f) is applicable in this case, or if process is due to the current ETCs in the rural areas at issue on any other basis, the Notice Requesting Comments, dated September 12, 2003, satisfies this requirement. *Waste Management of Wisconsin v. DNR*, 128 Wis. 2d 59, 78, 381 N.W.2d 318 (1985). (An appropriate "opportunity for hearing" may be exclusively through written comments.)

**Order**

1. Midwest is granted ETC status in the non-rural wire centers indicated in its application, to the extent the wire centers are located within the state.
2. Midwest is granted ETC status in the areas for which it has requested such designation where the request includes the entire territory of a rural telephone company, to the extent the areas are located within the state.
3. Midwest is granted ETC status in the areas for which it has requested such designation where the request does not include the entire territory of a rural telephone company, to the extent the areas are located within the state, conditioned upon the FCC approving the use of the smaller areas.
4. Midwest shall file a revised list of rural areas for which it is seeking ETC status by October 31, 2003, if the list attached to this order is inaccurate. The revised list shall use the same format as the attachment.
5. Midwest must request that the FCC approve the use of an area smaller than the entire territory of certain rural telephone companies (listed in an attachment to this order) when granting ETC status in those areas.

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6. If the FCC does not approve the use of areas smaller than the entire territory of a rural telephone company when granting ETC status in those areas, then the conditional grant of ETC status in this order is void.

7. Midwest shall not apply for state USF support. If it ever does file for such support, the state eligibility requirements for, and obligations of ETC status, shall immediately apply to it.

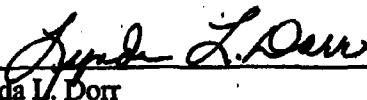
8. Based on the affidavit of Dennis Findley, Vice President and Chief Financial Officer, Midwest is an ETC within the meaning of 47 U.S.C. § 214 (c) and is eligible to receive funding pursuant to 47 U.S.C. § 254 (2). This order constitutes the certification to this effect by the Commission.

9. The requests for a contested case hearing by CenturyTel, Inc., TDS Telecom Corp., CUB, WTSa Small Company Committee, and WSTA ILEC Division are rejected.

10. Jurisdiction is maintained.

Dated at Madison, Wisconsin, September 30, 2003

By the Commission:



Lynda L. Dorr  
Secretary to the Commission

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See attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

APPENDIX A

This proceeding is not a contested case under Wis. Stat. Ch. 227, therefore there are no parties to be listed or certified under Wis. Stat. § 227.47. However, an investigation was conducted and the persons listed below participated.

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APPENDIX B

**Non-Rural Wire Centers**

**Operating Company**

SBC Wisconsin

SBC Wisconsin

SBC Wisconsin

SBC Wisconsin

**Exchange**

Ellsworth

Menomonie

River Falls (partial)

Eau Claire (Partial)

**Rural Wire Centers (Requesting entire service territory)**

**Operating Company**

Cochrane Cooperative Telephone Co.

Cochrane Cooperative Telephone Co.

Hager Telecom, Inc.

Hager Telecom, Inc.

Nelson Telephone Cooperative

Nelson Telephone Cooperative

Nelson Telephone Cooperative

Nelson Telephone Cooperative

Tenney Telephone Co.

**Exchange**

Cochrane

Waumandee

Bay City

Hager City

Durand

Arkansas

Nelson

Gilmanton

Alma

**Rural Wire Centers (not requesting entire service territory)**

**Operating Company**

Telephone USA of Wisconsin, LLC d/b/a CenturyTel, Inc.

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

(Wire Centers)

CenturyTel of Central Wisconsin, LLC d/b/a CenturyTel, Inc.

(Wire Centers)

(Wire Centers)

Chibardun Telephone Coop.

Chibardun Telephone Coop.

**Exchange**

Prescott

Elmwood

Plum City

Maiden Rock

Pepin

Knapp

Boyceville

Glenwood City (Partial)

Wheeler

Colfax (Partial)

Elk Mound (Partial)

Fountain City

Arcadia (Partial)

Ridgeland (Partial)

Sand Creek (Partial)

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**Chibardun Telephone Coop.**

**Chibardun Telephone Coop.**

**Frontier- Mondovi**

**West Wisconsin Telecom Cooperative, Inc.**

**West Wisconsin Telecom Cooperative, Inc.**

**West Wisconsin Telecom Cooperative, Inc.**

**West Wisconsin Telecom Cooperative, Inc.**

**West Wisconsin Telecom Cooperative, Inc.**

**Spring Valley Telephone**

**Prairie Fann (Partial)**

**Dallas (Partial)**

**Mondovi (Partial)**

**Spring Lake (Partial)**

**Eau Galle**

**Downsville**

**Rock Falls (Partial)**

**Elk Lake (Partial)**

**Spring Valley**



## **CERTIFICATE OF SERVICE**

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 28<sup>th</sup> day of May, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Comments of Midwest Wireless Wisconsin L.L.C.* filed today to the following:

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\_\_\_\_\_/s/\_\_\_\_\_  
Kimberly Verven